The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE, SIERRA CLUB, and IDAHO CONSERVATION LEAGUE, Plaintiffs, v. SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency, and R.D. JAMES, in his official capacity as Secretary of the Army for Civil Works, Defendants, and AMERICAN FARM BUREAU FEDERATION, et al., Defendant-Intervenors	Case No. 2:15-cv-01342-JCC PLAINTIFFS' SUPPLEMENTAL BRIEF

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Plaintiffs Puget Soundkeeper Alliance, Sierra Club, and Idaho Conservation League (collectively "Plaintiffs") submit this supplemental brief in response to the Court's Order Requesting Additional Briefing, Dkt. # 88 (July 24, 2019).

I. INTRODUCTION

To preserve this Court's time and resources and those of the parties, Plaintiffs filed their Motion for Summary Judgment on a limited subset of their claims against the 2015 Rule defining "waters of the United States," namely those relating to the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' (collectively "Agencies") action on the "Waste Treatment System Exclusion." Dkt. # 67.[1] Under the expanded interpretation of that Exclusion, which received the Agencies' formal imprimatur for the first time in the 2015 Rule, polluters can obtain permits to impound "waters of the United States" in order to use the resulting impounded water bodies as waste dumps. *Id.* at 5. Plaintiffs oppose that expansion as contrary to the Clean Water Act and to reasoned agency decision making. *Id.* at 5-13.

As to all the other aspects of the 2015 Rule that Plaintiffs have challenged, the Agencies currently are applying those provisions in fewer than half of the states in the country, and they now propose to repeal[2] and replace[3] the pertinent definitions with wholly different ones. Dkt. # 87 at 6. Given greater uncertainty about the fate of those other provisions in the 2015 Rule, Plaintiffs elected to hold off on pressing their remaining claims.

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[1] *See* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054, 37,055 (Jun. 29, 2015) (hereafter "2015 Rule").

[2] *See* "Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules," 82 Fed. Reg. 34,899 at 34,900, (July 27, 2017) (hereafter the "repeal-and-recodify rule"); "Definition of 'Waters of the United States'—Recodification of Preexisting Rule," 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice).

[3] *See* "Revised Definition of 'Waters of the United States,'" 84 Fed. Reg. 4,154 (Feb. 14, 2019). (hereafter the "replacement rule").

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While Plaintiffs anticipate that the proposed repeal-and-recodify rule or the proposed replacement rule may render briefing on some of their claims inapposite, the Waste Treatment System Exclusion is at least one significant exception. As to that Exclusion, in each of the two proposed rules the Agencies propose simply to *repeat* the same action they completed in 2015: codifying a drastically-expanded interpretation of the Waste Treatment System that Plaintiffs oppose as unlawful and arbitrary and capricious. *See* Sec. II, below.

Although Plaintiffs do not object to a stay of briefing or scheduling on their other claims, a general stay encompassing the pending Motion for Summary Judgment on the Waste Treatment System Exclusion claims is not warranted. As an initial matter, the possibility that an agency may complete a voluntary action that purports to moot an existing claim is frequently present in litigation concerning rulemaking, but that possibility alone is not a valid basis for denying relief. *See* Sec. V, below. In this case, the Agencies' action on the expanded Waste Treatment System Exclusion was completed more than four years ago and continues to harm Plaintiffs' members' interests. Further, because the Agencies plan simply to repeat the same unlawful action on the Waste Treatment System Exclusion in their proposed rules, any ruling and any declaratory or injunctive relief stemming from the pending Motion for Summary Judgment would apply or summarily extend to the proposed new actions on the Exclusion.

Should the Agencies complete their proposed actions before a ruling by this Court, Plaintiffs submit that any new action on the Waste Treatment System Exclusion would be best addressed through an amended and supplemental complaint. *Cf.* Plaintiffs' Mot. for Leave to Amend and Supp. Complt., Dkt. # 28 at 6-8.

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II. EXPLANATION OF THE PROPOSED REPEAL AND THE RESULTING RECODIFICATION OF THE PRE-2015 RULE REGIME.

The Agencies propose two separate rulemaking actions. The first would fully repeal the 2015 Rule and codify not only the pre-existing regulatory text, but also a vaguely-described interpretive "regime." 82 Fed. Reg. at 34,900. According to the public notice this means that the pre-2015 statutory text would be "informed by applicable guidance documents," including unspecified memoranda and guidance letters, "applicable case law, and longstanding agency practice." *Id.* Thus, the proposed repeal-and-recodify rule comprises affirmative regulatory action, establishing a new definitional and interpretive regime that differs from both the definitions in the 2015 Rule and the definitions promulgated before 2015.

The repeal-and-recodify rule would remove numerous provisions that Plaintiffs support, including the 2015 Rule's "definitions of key terms such as 'tributaries' and revised. . . terms such as 'adjacent' [including] a new definition of 'neighboring' that is used in the definition of 'adjacent') that [under the 2015 Rule] determine whether waters are 'jurisdictional by rule.'" 83 Fed. Reg. at 32,229. These portions of the Rule defining certain categories of waters as "jurisdictional by rule" were founded on sound science, broad public support, and a desire by the Agencies to make jurisdictional determinations with greater uniformity and consistency. *See* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054, 37,055 (Jun. 29, 2015).

Simultaneously, the repeal-and-recodify rule would eliminate certain exclusions from the definition of "waters of the United States" that were first adopted in the 2015 Rule and that Plaintiffs have challenged in this lawsuit. These include:

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(1) The 2015 Rule's exclusion removing "[w]aters being used for established normal farming, ranching, and silviculture activities" from the definition of "adjacent" "waters of the United States." First Am. Compl., Dkt. # 33, ¶ 73;

(2) The provisions allowing a case-specific "significant nexus" evaluation for those waters identified in Sections (1)(vii)-(viii) of the 2015 Final Rule, while excluding waters that fall outside of those sections.[4] *Id.* ¶ 75, 76; and

(3) The provisions limiting the definition of a jurisdictional "tributary" through the strict requirement to have "physical indicators of a bed and banks and an ordinary high water mark," notwithstanding evidence that tributaries lacking such physical indicators may still have a significant influence on downstream "waters of the United States." *Id.* ¶ 79.

As it relates to the Waste Treatment System Exclusion, the proposed recodification purports to "continue[]" a previously un-codified and un-promulgated modification expanding the Waste Treatment System Exclusion to systems created in jurisdictional "waters of the United States." *Id.* at 34,907. In other words, as to the Waste Treatment System Exclusion the proposed repeal-and-recodify action would have the precise same effect as the 2015 Rule.[5]

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[4] Waters eligible for case-specific determinations are set forth in two ways. There are five enumerated ecologically-specific types of wetlands (prairie potholes, Carolina bays and Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairie wetlands). First. Am. Compl. Dkt. # 33, ¶ 54 (discussing 80 Fed. Reg. at 37,114). There are also waters defined according to their distance from other jurisdictional waters. *Id.* ¶ 55. Ecologically sensitive waters that have significant chemical, physical, or biological influence on downstream "waters of the United States" are excluded by definition under the 2015 Rule if they fall outside of these narrow categories.

[5] Likewise, if the Agencies finalize the proposed replacement regulation, they will codify the same broad interpretation of the Waste Treatment System Exclusion, explicitly allowing polluters to "receive[] a permit to impound a water of the United States in order to construct a waste treatment system." *See* "Revised Definition of 'Waters of the United States,'" 84 Fed. Reg. 4,154 (Feb. 14, 2019).

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III. IMPACTS OF THE PROPOSED RECODIFICATION OF THE PRE-2015 RULE REGIME UPON THE STATUTE OF LIMITATIONS REGARDING PLAINTIFFS' WASTE TREATMENT SYSTEM EXEMPTION CLAIMS.

Both the proposed repeal-and-recodify rule and the proposed replacement rule would repeat, *i.e.* re-create, the same unlawful expansion of the Waste Treatment System Exclusion that the Agencies completed in the 2015 Rule. For the same reasons demonstrating why the 2015 Rule's expanded Waste Treatment System Exclusion constituted a final agency action subject to judicial review, the proposed repeal-and-recodify rule adopting the expanded Exclusion also would constitute reviewable final agency action. *See* Plaintiffs' Mot. for Summ. Judgment, Dkt. # 67 at 9-12. That action is subject to the general statute of limitations for civil actions against the United States in 28 U.S.C. § 2401(a). *Citizens Legal Enf't & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1225 (S.D. Cal. 2011), *aff'd*, 540 F. App'x 587 (9th Cir. 2013) (citing *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)).

The Court should reject the notion that Plaintiffs' existing claims on the Waste Treatment System Exclusion are time-barred. Dkt. # 88 at 4. That argument is founded on the false premise that the expanded Waste Treatment System Exclusion had already been in place as the result of a 1980 un-promulgated "suspension" of limiting language contained in the original exclusion, but that "suspension" was published in the federal register with no advance public notice or opportunity to comment, and with a promise to revisit the matter expeditiously in a procedurally compliant rulemaking. *See* Dkt. # 88 at 2. The Agencies never undertook the promised rulemaking. In 1986 Defendant U.S. Army Corps of Engineers published a rule defining "waters of the United States" that includes the Waste Treatment System Exclusion, but with no mention of the "suspended" language limiting the Exclusion to manmade systems created outside of "waters of the United States." Final Rule for Regulatory Programs of the Corps, 51 Fed. Reg. 41206, 41,250 (Nov. 13, 1986). In 1988 Defendant Environmental Protection Agency published

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a revised definition of "waters of the United States" that incudes the WTSE, with no mention of the limiting language. CWA § 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20774 (June 6, 1988). Neither of those rulemakings purported to permanently eliminate the limiting language or to adopt an expanded version of the Exclusion.

Nonetheless, the Agencies and Intervenor-Defendants contend that the 2015 Rule did nothing more than "continue" the expanded Exclusion. *See* Dkt. # 72 at 11, 16; Dkt. # 79 at 4, 14. On the contrary, the Agencies had never promulgated the expanded version or interpretation of the Waste Treatment System Exclusion in accordance with fundamental administrative law requirements—and at the same time their interpretation of the pertinent regulatory text shifted significantly over time. Dkt. # 83 at 4. But the Agencies did take action in the 2015 Rule to expressly adopt and codify the expanded Exclusion for the first time in a notice-and-comment rulemaking. That move was a new final agency action, subject to judicial review under the six-year statute of limitations in 29 U.S.C. § 2401(a). Any future action adopting the proposed repeal-and-recodify rule as final would not interfere with the existing statute of limitations and would simply amount to a separate final agency action subject to its own six-year statute of limitations period.

IV. IMPACTS OF THE PROPOSED REPEAL RULE AND THE PROPOSED REPLACEMENT RULE ON THIS LITIGATION.

The Agencies' proposed rules would have mixed effects on the Waste Treatment System Exclusion-related claims versus Plaintiffs' other claims.

A. Pending Summary Judgment Motion And Requests For Declaratory and Injunctive Relief.

As to the Waste Treatment System Exclusion, this Court's efforts to resolve the pending Motion for Summary Judgment are and will remain an efficient use of judicial resources, because each proposed rule would repeat the unlawful expansion of the Waste Treatment System

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Exclusion. Each rule would raise the same fundamental questions of whether the Agencies exceeded their statutory authority by taking action to codify an expansive interpretation of the Exclusion under which polluters can press natural "waters of the United States" into service as industrial waste dumps.

The mere potential for a future final rule cannot moot an existing claim, and even if the Agencies do ultimately finalize the proposed repeal-and-recodification rule, Plaintiffs' Exclusion claim still would not be moot at that time, because Plaintiffs would maintain a legally cognizable interest in the same expanded Exclusion under the future rules. A case becomes moot "if '(1) it can be said with assurance that 'there is no reasonable expectation ...' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 854 (9th Cir. 1985) (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). "The burden of demonstrating mootness is a heavy one." *Nw. Envtl. Def. Ctr. v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979); *Arnold v. United States*, 816 F.2d 1306, 1309 (9th Cir.1987)). The heavy burden of demonstrating mootness has not been met in this case.

Because the expanded interpretation of the Waste Treatment System Exclusion has never been adopted through legally-sufficient notice and comment rulemaking, it is also likely that the same procedural issues would arise under the proposed rules. This is especially so as to the proposed repeal-and-recodify rule, which suffers virtually the same procedural defects as the 2015 action on the Waste Treatment System Exclusion. The proposed replacement rule contains substantially the same defects because, although the Agencies invited comment on a new proposed definition of "waste treatment system," 84 Fed. Reg. at 4190, they maintained their

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counter-factual position that this expanded version of the Exclusion merely "continues" the pre-existing one.

Plaintiffs' requests for relief would also retain their relevance if the proposed rules are finalized. Declaratory relief on Plaintiffs' existing Motion for Summary Judgment would provide relief from Defendants' defective action in 2015, and would provide useful legal guidance for their proposed replacement rule. The injunctive relief requested in the pending motion would also continue to provide relief, and is appropriate in light of the Agencies' ongoing proposals to codify an expanded Waste Treatment System Exclusion under the pretense that they have merely "continued" a pre-existing conclusion. The fact that the Agencies have undertaken voluntary action to initiate a new rulemaking creates at least two new future opportunities to evade judicial review of the expanded Waste Treatment System Exclusion, while at the same time using that exclusion as cover to allow permanent destruction of jurisdictional "waters of the United States." Plaintiffs therefore urge the Court to enter the requested injunctive relief: an order enjoining the Agencies from using the Waste Treatment System Exclusion to permit any new or expanded waste treatment systems other than systems that are consistent with the 1980 "suspended sentence" (*i.e.* manmade bodies of water that neither were originally created in waters of the United States nor resulted from the impoundment of waters of the United States), pending the Agencies' completion of notice and comment rulemaking to address the suspended sentence.

B. Impacts Of The Proposed Rules Upon The Lawsuit As A Whole.

As to the other provisions of the 2015 Rule challenged in this lawsuit, both the repeal-and-recodify rule and the replacement rule would institute significant changes to the pertinent regulatory definitions. *See* Sec. II above. Plaintiffs anticipate that such actions would render any briefing or ruling on the merits of these provisions inapposite, insofar as the definitions and the Agencies' rationales for adopting them are substantially – even incompatibly – different. For

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example, the repeal-and recodify rule would remove the 2015 Rule's new exclusion of "[w]aters being used for established normal farming, ranching, and silviculture activities" from the definition of "adjacent" "waters of the United States." First Am. Complt., Dkt. # 33, ¶ 73. Accordingly, Plaintiffs do not anticipate filing dispositive motions or briefs on their claims other than the ones stemming from the Waste Treatment System Exclusion, unless and until they receive indications that the proposed repeal-and-recodify rule or replacement rule will not be finalized.

V. THE PROPOSED REPEAL RULE DOES NOT WARRANT A GENERAL STAY OF THIS LITIGATION.

While Plaintiffs do not object to an order staying their other claims as discussed above, a general stay encompassing the expanded Waste Treatment System Exclusion is not warranted. The expanded Exclusion remains in place regardless of Agency plans to take further action in the future. In any event, the Agencies and Intervenor-Defendants do not even attempt to argue that the expanded Exclusion is likely to change in substance or scope as the result of either of the proposed rules.

Although this question arose *sua sponte*, Dkt. # 88 at 1, Plaintiffs submit that the usual standards for entering a stay are relevant. The decision to grant a stay is within the discretion of the court. *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007); *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003). In deciding whether to enter a stay, courts weigh three factors: (1) possible damage to the non-moving party of a stay; (2) hardship or inequity to the movant if stay is not granted; and (3) the orderly course of justice in terms of simplifying or complicating issues, proof, and questions of law. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). "[I]f there is even a fair possibility that the stay . . . will work damage to some one

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else," the party seeking the stay "must make out a clear case of hardship or inequity." 299 U.S. at 255. Ongoing damage to the non-moving party weighs against granting the motion. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (defendants' motion for stay not justified where other court action would not necessarily resolve all issues and grounds other than judicial economy were found to lack merit).

In this matter, Plaintiffs have submitted declarations describing permits that Plaintiffs' members believe to be defective because of their reliance on the expanded Waste Treatment System Exclusion to permit the creation of new waste storage conveyance structures in "waters of the United States." Dkt. # 67-3 (Angstman Decl.); Dkt. # 67-6 (DeWitt Decl.). Harm to Plaintiffs' interests is therefore likely. In contrast, neither the Agency nor Intervenor-Defendants have identified any material harm to their interests if a stay is not entered. Finally, the orderly course of justice counsels strongly against allowing federal Agencies to evade judicial review of a final action based on their plans to change the rules at a future time.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court address their Motion for Summary Judgement, and enter an order directing the parties to provide regular updates on the status of the Agency rulemakings insofar as is pertinent to Plaintiffs' other claims.

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Respectfully submitted this 9th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jennifer C. Chavez
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